STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL LASKY,

Plaintiff-Appellant,

v

REALTY DEVELOPMENT COMPANY, L.L.C., f/k/a REALTY DEVELOPMENT COMPANY LIMITED PARTNERSHIP, CAMPBELL/MANIX ASSOCIATES, INC., and CAMPBELL/MANIX, INC.,

Defendants-Appellees.

UNPUBLISHED
April 27, 2006

No. 258125
Wayne Circuit Court
LC No. 03-323588-NO

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Plaintiff, an ironworker for one of defendants' subcontractors, brought this negligence action after he was injured on a job site. Plaintiff appeals as of right from the trial court's September 3, 2004, order granting defendants' motion for summary disposition. We affirm.

I

Plaintiff, an apprentice ironworker for American Erectors, Inc., was injured while working at a construction site involving a commercial office building, known as the Victor Park project, in Livonia, which was owned by defendant Realty Development Company, L.L.C. Defendant Campbell/Manix, Inc. was the construction manager/general contractor for the project. Campbell/Manix hired American Steel as the steel erector, and American Steel subcontracted the job to plaintiff's employer, American Erectors. Plaintiff was injured when he fell more than 15 feet from an unprotected second-floor elevation while "shaking out" large sheets of steel decking.

On the day of the accident, plaintiff was working with another man, on a steel beam approximately 20 feet above the ground. The men were removing pieces of decking from a large bundle, and when plaintiff's coworker "threw" his end of the decking, it "bucked backwards" and knocked plaintiff off the beam. The decking sheets were approximately three feet wide and thirty feet long. Plaintiff had been given fall protection training through his union apprenticeship program and was wearing a safety harness, but he was not "tied off" for safety because he was

not working 30 feet above ground, the height at which he believed tie off would be required. The equipment he needed to "tie off" was "in the truck."

Plaintiff alleged in his complaint that Realty Development, as the principal, and Campbell/Manix, as its agent, had a nondelegable duty to provide a safe workplace. Plaintiff also alleged that he was engaged in inherently dangerous work at the time of his accident.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that they were not liable for plaintiff's injuries because plaintiff was not engaged in inherently dangerous work, that defendants did not retain control of the project, and that plaintiff was not injured in a common work area. Relying on *DeShambo v Anderson*, 471 Mich 27; 684 NW2d 332 (2004), the trial court granted defendants' motion, concluding that defendants had no duty to plaintiff, the employee of a subcontractor. The court denied plaintiff's subsequent motion to amend his complaint to add a claim for nuisance, finding that the amendment would be futile.

II

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion under MCR 2.116(C)(10), the trial court considers the pleadings, and any affidavits, depositions, admissions or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. *Id*.; *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

III

Plaintiff argues that the evidence established a triable issue of fact concerning whether there was an agency relationship between defendants, and thus the trial court erred in granting summary disposition of plaintiff's claim of liability under an agency theory. We find no error in the trial court's grant of summary disposition.

As a general rule, property owners and general contractors are not liable for the negligence of independent subcontractors and their employees. *DeShambo, supra* at 31. An exception exists if the work contracted for is "inherently dangerous activity." *Id*. The inherently dangerous activity doctrine eliminates the nonliability of landowners for injuries to innocent third parties caused by inherently dangerous activity undertaken by an independent contractor on the land of the landowner. *Id*. at 33. In *DeShambo,* the Court held that the exception does not encompass injuries to those involved in the performance of the dangerous work, i.e., an injury to an employee of an independent contractor. *Id*. at 28.

> When a landowner hires an independent contractor to perform work that poses a peculiar danger or risk of harm, it is reasonable to hold the landowner liable for harm *to third parties* that results from the activity. If an employee of the contractor, however, negligently injures himself or is injured by the negligence of a fellow employee, it is not reasonable to hold the landowner liable merely because the activity involved is inherently dangerous. [*Id*. at 38.]

Because *DeShambo* was decided after this action was commenced, plaintiff argued that *DeShambo* should not be applied retroactively to preclude liability.[1] Additionally, plaintiff argued that defendants were liable for his injuries under agency principles. It was plaintiff's theory that given the principal-agent relationship between defendants, this case involved a claim of vicarious liability. Plaintiff argued that the owner, Realty Development, was the principal and that its construction manager, Campbell/Manix, was its agent. Plaintiff relied on clauses in the defendants' construction contract that gave Campbell/Manix "control over construction means, methods, techniques, sequences, and procedures," and for all safety procedures. Plaintiff also relied on alleged admissions by Campbell/Manix that it was to be the owner's "eyes and ears" on this project and was responsible for construction. Accordingly, plaintiff argued that Realty Development was liable for the negligence of Campbell/Manix in its superintendence of the work and its administration of the contract.

We find no basis for imposing liability on defendants under a theory of agency to essentially create a further exception to the general rule of landowners nonliability for the acts of independent contractors. The inherently dangerous activity exception is "founded on the existence of a duty on behalf of the landowner, or employer of an independent contractor, and the duty must be of the type that is nondelegable." *Id*. at 34. Under the circumstances of this case, we find plaintiff's agency theory to be a distinction without a difference in terms of defendants' liability to plaintiff.[2]

In support of his argument, plaintiff merely cites the general law of agency and cites no authority supporting his specific contention that agency principles provide an independent basis for imposing liability on a landowner or general contractor for the acts of subcontractors, contrary to the general rule of nonliability.[3] An appellant may not merely announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs,* 251 Mich App 379, 406; 651 NW2d 756 (2002). Because we find no basis for liability on a theory of agency under the circumstances of

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[1] The issue of retroactivity is addressed subsequently.

[2] To the extent that plaintiff argues that the contract between Realty Development and Campbell/Manix imposed a nondelegable duty on the part of Campbell/Manix to supervise jobsite safety, the same reasoning applies.

[3] Moreover, plaintiff's arguments incorporate several independent theories of liability, e.g., respondeat superior, contractual liability, principal-agent, and thus his specific theory is not entirely clear. "If the employer of a person or business ostensibly labeled an 'independent contractor' retains control over the method of the work, there is in fact no contractee-contractor relationship, and the employer may be vicariously liable under the principles of master and servant." *Candelaria v BC Gen Contractors, Inc,* 236 Mich App 67, 73; 600 NW2d 348 (1999); see also *Kerry v Turnage,* 154 Mich App 275, 281; 397 NW2d 543 (1986) ("Vicarious liability describes the existence of a relationship, not a cause of action. Because of this relationship, the principal is held responsible for the torts of its agent which are committed in the scope of the agency.")

this case, we need not address plaintiff's argument that there was a triable issue of fact concerning whether Realty Development was the principal and Campbell/Manix was its agent.

In any event, we find plaintiff's agency argument flawed. "[F]undamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to matters entrusted to him." *St Clair Intermediate School Dist v Intermediate Ed Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998) (citation omitted). In order to establish an agency relationship in this case, plaintiff needed to show that Realty Development, the alleged principal, retained a right to control the conduct of Campbell/Manix, the alleged agent. Instead, plaintiff asserted that Realty Development intended Campbell/Manix to be "solely responsible" for the construction of the building and for job safety on the work site. Plaintiff's argument, that defendants' contract "plainly, clearly, directly, and unambiguously placed the ultimate responsibility for job safety squarely on the shoulders of Campbell/Manix," is contrary to the requirement that Realty Development have the right to control Campbell/Manix, which would be required for a finding of agency. *Id.* at 557-558.

In *DeShambo, supra* at 40, our Supreme Court recognized that landowners often hire an independent contractor precisely because they want someone who "specialize[s] and routinely engage[s]" in the dangerous work and who is "better able to perform the activity in a safe manner." The evidence presented by plaintiff suggests the opposite of what plaintiff is trying to prove, does not suggest that Realty Development exercised control or supervision over Campbell/Manix's method of work, and does not create a factual question regarding the existence of an agency relationship between Realty Development and Campbell/Manix for purposes of tort liability. The trial court properly granted defendants' motion for summary disposition on plaintiff's agency-based claim.

IV

Plaintiff argues that, contrary to the trial court's conclusion, the decision in *DeShambo* should be applied only prospectively. We disagree.

> The general rule is that judicial decisions are given complete retroactive effect. However, recognition of the effect of changing settled law has led this Court to consider limited retroactivity when overruling prior case law. In examining the potential effect of a retroactive decision, this Court gauges (1) the purpose served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. [*Lesner v Liquid Disposal, Inc*, 466 Mich 95, 108-109; 643 NW2d 553 (2002) (citation omitted).]

An "additional threshold question" is "whether the decision clearly established a new principle of law." *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002).

In *DeShambo*, *supra* at 31, the Supreme Court observed that "[i]t has long been established in Michigan that a person who hires an independent contractor is not liable for injuries that the contractor negligently causes." The Court acknowledged that the "inherently dangerous activity" doctrine was an exception to this general rule, and that "[t]he class of persons protected under the doctrine has undergone a transformation since the doctrine's inception." *Id.* Although some cases had applied it to situations involving employees of

independent contractors, after examining the history of the doctrine, the Court concluded that it was intended only to protect third parties, and "does not apply when the injured party is an employee of an independent contractor rather than a third party." *Id.* at 41. It is apparent from our Supreme Court's explanation in *DeShambo* that it was not creating a new rule of law, but rather was merely clarifying "longstanding precedent." *Id.* at 40.

When a judicial decision "does not announce a new rule of law, but rather returns our law to that which existed" before an improper extension, it should be applied retroactively. *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004). The Supreme Court in *DeShambo* concluded that the inherently dangerous activity doctrine had been improperly expanded. *DeShambo*, *supra* at 34-35, 40. Its discussion indicates that it did not consider its holding limiting the doctrine to be a new principle of law, but rather as one that conformed to "longstanding precedent." *Id*. at 40. Accordingly, retroactive application is proper. *Pohutski, supra*, at 696.

V

Plaintiff argues that the court erred in denying plaintiff's motion for leave to amend the pleadings, MCR 2.115(I)(5), to assert a claim of nuisance *per accidens*. We disagree.

"The grant or denial of leave to amend is within the sole discretion of the trial court." *Knauff v Oscoda Drain Comm'r*, 240 Mich App 485, 493; 618 NW2d 1 (2000). "[R]eversal is only appropriate when the trial court abuses that discretion." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Contrary to plaintiff's argument, he did not have "an absolute right" to amend his complaint. MCR 2.118(A)(2) provides that, as a general rule,[4] "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Additionally, MCR 2.116(I)(5) provides that when the ground asserted in a motion for summary disposition is based on subrule (C)(10), as was the case here, "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence before the court shows that amendment would not be justified." An amendment "would not be justified if it would be futile." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004); *Weymers, supra* at 658.

After the trial court granted summary disposition for defendants, plaintiff moved to amend his complaint to add a count of nuisance *per accidens*. The trial court properly considered plaintiff's motion to determine whether an amendment was justified, MCR 2.116(I)(5), and concluded that amendment would be futile. We find no abuse of discretion.

A nuisance *per accidens* is also known as a nuisance "in fact," and includes "those which become nuisances by reason of circumstances and surroundings, and an act may be found to be a nuisance as a matter of fact where the natural tendency of the act is to create danger and inflict

[4] The exception under MCR 2.118(A)(1) is not at issue here.

injury on person or property." *Bluemer v Saginaw Central Oil Gas Service, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959) (citations omitted). Traditionally, the theory of nuisance involves "an unreasonable and substantial interference with the use or enjoyment of the property of another." 23 Michigan Law & Practice, Nuisance, § 1, pp 93, 97. However, "several Michigan decisions use the term 'nuisance' liability to refer to what is essentially premises liability, i.e, where a person is injured while on another's property on account of a dangerous condition." *Id*., § 1, p 97. Plaintiff apparently relies on the latter use of the term to allege essentially premises liability.[5]

As discussed above, with regard to plaintiff's agency theory of liability, we find no basis for imposing liability on defendants under a theory of nuisance to essentially create a further exception to the general rule of landowners nonliability for the acts of independent contractors. The inherently dangerous activity exception is "founded on the existence of a duty on behalf of the landowner, or employer of an independent contractor, and the duty must be of the type that is nondelegable." *DeShambo*, *supra* at 34. Under the circumstances of this case, we find plaintiff's nuisance theory to be a distinction without a difference in terms of defendants' liability to plaintiff.

A similar theory of nuisance was addressed in *Kilts v Bd of Supervisors of Kent Co,* 162 Mich 646, 651; 127 NW 821 (1910), where our Supreme Court concluded that "a nuisance involves, not only a defect, but threatening or impending danger to the public, or if a private nuisance, to the property rights or health of persons sustaining peculiar relations to the same, and that the doctrine should be confined to such cases." The Court found that the defendants "owed no duty to the deceased [employee of the defendants' subcontractor] not to erect or maintain this structure," and concluded that "[h]is rights under such employment, such as the right to a safe place to work, and to warning of danger, are to be measured by the ordinary rules of negligence cases, and grow out of his contract of employment, whether the tower was a private nuisance as to other persons or not." *Id.* at 653.

We recognize that in *Schoenherr v Stuart Frankel Dev Co*, 260 Mich App 172, 180; 679 NW2d 147 (2003), this Court, without discussion, agreed with the plaintiff that the rule of 2 Restatement Torts, 2d, § 427B, p 419, is a rule of liability that "operates independently of the general rule of nonliability of employers of independent contractors to employees of contractors." In *Schoenherr*, the plaintiff was injured after falling from a roof he was repairing for his employer, the defendant property manager's contractor. *Id.* at 174. This Court held that summary disposition of the plaintiff's nuisance claim, in favor of the defendant, was appropriate because the plaintiff had not demonstrated "how defendants knew or should have known that [the contractor] would create a nuisance." *Id.* at 180. Thus, *Schoenherr,* could be read to implicitly extend a cause of action for nuisance *per accidens* to the context of an employee working for an independent contractor. However, *Schoenherr* provides no insight concerning the nature of the plaintiff's nuisance claim and no analysis distinguishing between traditional

[5] Plaintiff cites as illustrative of its nuisance liability theory some of the same cases cited as authority for "other nuisance liability," e.g., premises liability, discussed in Michigan Law and Practice, § 1, p 97.

nuisance and the "premises liability" theory of nuisance recognized in Michigan, which is at issue in this case.[6]

In light of this Court's determination in *Schoenherr* that the plaintiff could not prevail under such a theory because the defendants lacked knowledge of the alleged nuisance, a conclusion that a nuisance action is available to an employee of an independent contractor was not essential to its determination of the outcome of the case. "Statements regarding a rule of law that are not essential to the outcome of the case do not create a binding rule of law." *Meyer v Mitnick*, 244 Mich App 697, 701; 625 NW2d 136 (2001).

We conclude that the amendment of plaintiff's complaint to add his nuisance theory would have been futile. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens

[6] Given the Supreme Court's conclusion in *DeShambo*, *supra* at 38-40, that the provisions in 2 Restatement of Torts, 2d, that referred to "others," and the illustrations for those provisions, refer to third parties and not to persons involved in the dangerous activity, the reference in § 427B to "others" calls into question any reasoning in *Schoenherr* that would imply liability for injuries to employees such as plaintiff, who are persons involved in the dangerous activity and not innocent third parties.